

IN THE MATTER OF	:	BEFORE THE
T-MOBILE NORTHEAST, LLC	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 09-024C

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DECISION AND ORDER

On October 5, 2009, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of T-Mobile for conditional use approval of a Commercial Communications Tower and Commercial Antenna, specifically a 140-foot monopole and fenced equipment compound in an RR-DEO (Rural Residential-Density Exchange Option Overly) Zoning District, filed pursuant to Section 131.N.14 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified to complying with the advertising and posting requirements of the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Sean Hughes, Esquire, represented the Petitioner. At the outset of the proceeding, Mr. Hughes stated the Petitioner agreed with the Technical Staff Report and would present no additional testimony or evidence.

A Preliminary Matter

At the outset of the proceeding, I informed the Petitioner and Counsel that an adjoining property owner had corresponded with Bob Lalush, Acting Chief, Division of Public Service and Zoning Administration, concerning the Petitioner's failure to provide him or her written notice of

the pre-submission meeting hearing, as required by Section 131.F of the Zoning Regulations.¹ The complainant did not appear at the proceeding. Because the determination of compliance of procedural notice requirements is fact-based, and the Zoning Regulations do not require the Hearing Authority to dismiss a petition for lack of notice in such circumstances, I permitted the proceeding to continue.

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

1. The 126.17-acre, irregularly shaped subject property is located in the 5th Election District on the west side of Haviland Mill Road about 1.2 miles south of Brighton Dam Road. It is referenced on Tax Map 39, Grid 6, as Parcel 1, and is also known as 6950 Haviland Mill Road (the "Property").

2. The Property is a large farm with multiple crop areas separated by narrow tree and vegetative buffers or wide wooded areas. The Property is accessed from Haviland Mill Road via an existing driveway on Parcel 9, an interior lot surrounded by Parcel 1. Both properties are in the same ownership. The driveway runs from the southernmost section of Parcel 1 and northwest toward the center of Parcel 9. On the east side of Parcel 9, an existing gravel driveway runs eastward through Parcel 1, past a shed and barn, and ends at two house sites on the Property. The rolling topography slopes downward from the north to the west, southwest, and south.

¹ I received a copy of Mr. Lalush's October 01, 2009 email to Robin Regner asking her to apprise me of this omission. Mr. Regner redacted that portion of the email dealing with the complainant's testimony. Mr. Lalush copied the email to the apparent complainant.

3. Vicinal Properties. All adjacent properties are zoned RR-DEO. Parcel 62 to the north is the state-owned Patuxent River State Park. To the east, Parcel 52 is a 29+-acre farm and Lots 1 and 2 of the Nearings Subdivision. Lot 1 is improved by a single-family dwelling fronting on Haviland Mill Road. Lot 2 is a small farm with a house and other buildings set back from the road. Across Haviland Mill Road to the south and southeast are Lots 2 and 3 of the Zirn Subdivision, and Parcel 8. Each property is improved by a single-family detached dwelling on the hillside facing the Property. To the south and west is the state-owned Parcel 8. Beyond Parcel 8 lie the Patuxent River and the Howard County/Montgomery County boundary.

4. Roads. Haviland Mill Road has two travel lanes and about 22 feet of paving within a variable width right-of-way. The posted speed limit is 30 MPH. The estimated sight distance from the existing driveway entrance at Haviland Mill Road is about 350 feet to the northeast and more than 500 feet to the south. The Technical Staff Report ("TSR") concludes sight distance for the proposed use is not an issue because it will generate minimal traffic. No traffic data is available for Haviland Mill Road. According to Department of Public Works data, the traffic volume on Haviland Mill Road south of Brighton Dam Road was 776 average daily trips as of February 1998.

5. Water and Sewer. The Property is served by private water and sewer, neither of which is required by the use.

6. General Plan. Policies Map 2000-2020 of the 2000 General Plan designates the Property as "Rural Residential." The General Plan Transportation Map depicts Haviland Mill Road as a Minor Collector.

7. The Proposal. Petitioner is proposing to construct and operate a new commercial telecommunications monopole facility in the Property's southeastern portion and about 207 feet from the east side of Parcel 1. The facility would comprise a 25-foot by 35-foot fenced, gravel surface compound housing multiple equipment cabinets and a 140-foot monopole. The compound will be screened by a six-foot board-on-board gated fence, evergreen trees and other plantings along the south and east sides. No tower lights are proposed unless required by the Federal Aviation Administration. The monopole will house six antennas, with the potential for three future antennas, and the compound will accommodate one additional carrier.

8. In response to questioning, the Petitioner agreed that the monopole would be grey or a similar color.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude as follows:

I. General Criteria for Conditional Uses (Section 131.B)

A. Consistency with the General Plan

Section 131.B.1 requires me to evaluate whether the proposed conditional use plan will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district based on in which it is located. In making this evaluation, I am required to consider:

- a. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and**
- b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.**

General Plan Policies. The General Plan designates the area as Rural Residential. Because the Property is a working farm, a typical rural use, and the proposed use complies with the criteria for commercial communications towers and antennas, I conclude it is consistent with the General Plan.

The Nature and Intensity of the Use. In this case, the Petitioner is proposing a low intensity, passive utility occupying a small portion of the Property. It would make infrequent use of the compound.

The size of the site in relation to the use. The proposed area of the Property for the facility is very small relative to the Property. The Site is an appropriate size in relation to the use.

The location of the site with respect to streets giving access to the site. The Site will be accessed from an existing driveway, which appears to have adequate sight distance for infrequent visits to the compound.

The appropriateness of the conditional use in combination with a permitted use on the site. The proposed facility will be combined with a permitted use, a large working farm surrounding the use. The Compound will be located 200± feet from Parcel 1.

2. Adverse Effect

Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under Section 131.B.2's four "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (d) access.

When assessing a proposed conditional use under these criteria, we must first recognize that virtually every human activity has the potential for adverse impact. Zoning recognizes this

fact and, when concerned with conditional uses, accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before me is not whether the proposed use would have adverse effects in a B-2 District. The proper question is whether there are facts and circumstances showing that the particular use proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone. *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 956 A.2d 166 (2008); *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, I conclude the Petitioner has met its burden under Section 131.B.2 of the Zoning Regulations to establish this proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with the a commercial communications tower and antenna in an RR-DEO Zoning District.

a. Physical Conditions. Whether the impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.

There is no evidence the use would generate inordinate noise or other physical effects detectable from adjacent properties. I therefore conclude that any inherent operational adverse effects resulting from the proposed conditional use will not be greater at the subject site than elsewhere in the zone or applicable other zones.

b. Structures and Landscaping. The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

The proposed 140-foot monopole would be sited more than 560 feet from the closest property line (excluding Parcel 9, which is part of the same farm). The fenced facility will significantly beyond the 30-foot use setback requirement. The compound itself will be buffered by a fence and proposed landscaping and well buffered by distance and existing vegetation.

Although the Property's sloping topography will make the monopole visible from the dwellings across Haviland Mill Road and to the east and south, especially in the winter, the physical distance between the monopole, as described below, and these properties will mitigate its visible presence and no lighting is proposed unless required by the Federal Aviation Commission.

c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

The existing driveway would provide adequate parking when access is needed. The physical distance of the driveway and topographic conditions will provided sufficient screening.

d. Access. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.

The existing driveway appears to provide continued safe access; with adequate sight distance.

II. Specific Criteria for Communications Towers or Antennas (Commercial) (Section 131.N.14)

Section 131.N.14.a provides for the use in an RR Zoning District subject to compliance with the criteria in Section 131.N.14.b.

(1) An applicant for a new communication tower shall demonstrate that a diligent effort has been made to locate the proposed communication facilities on a government structure or, on an existing structure or within a non-residential zoning district, and that due to valid considerations, including physical constraints, and economic or technological feasibility, no appropriate location is available. The information submitted by the applicant shall include a map of the area to be served by the tower, its relationship to other antenna sites in the petitioner's network, and an evaluation of existing buildings taller than 50 feet, communication towers and water tanks within one-half mile of the proposed tower.

In this case, the petition and supporting material, including a map and photo-simulations submitted with the petition, demonstrate the absence of any governmental or commercial structure or any water tanks or transmission towers within a one-mile radius in the vicinity.

(2) New communication towers shall be designed to accommodate antennas for more than one user, unless the applicant demonstrates why such design is not feasible for economic, technical or physical reasons. Unless collocation has been demonstrated to be infeasible, the conditional use plan shall delineate an area near the base of the tower to be used for the placement of additional equipment buildings for other users.

The proposed monopole is designed to accommodate at least one other telecommunications carrier and related ground equipment.

(3) Ground level equipment and buildings and the tower base shall be screened from public streets and residentially-zoned properties.

A high fence and landscaping will screen the equipment.

(4) Communication towers shall be grey or a similar color that minimizes visibility, unless a different color is required by the Federal Communications Commission or the Federal Aviation Administration.

The Petitioner's counsel agreed that the monopole would be grey or a similar color.

(5) No signals or lights shall be permitted on a tower unless required by the Federal Communications Commission or the Federal Aviation Administration.

No additional signals or lights are proposed.

ORDER

Based upon the foregoing, it is this 12th day of October 2009, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the petition of T-Mobile for a 140-foot high monopole and equipment compound in an RR-DEO (Rural Residential-Density Exchange Option Overly) Zoning District, is **GRANTED;**

Provided however, that;

1. The Conditional Use shall be conducted in conformance with and shall apply only to the proposed 140-foot monopole and equipment compound.
2. No additional lighting is permitted other than that required by the Federal Communications Commission or the Federal Aviation Administration.
3. The monopole shall be grey or a similar color.
4. If no longer used, the communication tower shall be removed from the site within one year of the date the use ceases.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**

MICHELE L. LEFAIVRE
Michele L. LeFaivre

Date Mailed: 10/15/09

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.